Supreme Court, U.S.
FILED

982035 JUN 16 1999

No. _____

In The
Supreme Court of the United States

FRANK AND HELEN MCGEE
Petitioners,

v.

COUNTY OF ORANGE
A Political Subdivision of the State of California
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Admited United States Supreme
Court, 13 October, 1964

50pp

QUESTIONS PRESENTED

Did the Court of Appeals err in upholding a Bankruptcy Appellant Panel opinion denying Appellant equity by stating, "Although bankruptcy courts are courts of equity, Appellants should not receive special benefit merely because they are pursuing their refund claim in the bankruptcy forum"?

Did the Court of Appeals err by upholding Bankruptcy Appellate Panel of the Ninth Circuit's Opinion affirming and sustaining a bankrupt Orange County, CA's Objection, based on a statute of limitations that starts to run after a required Notice of Overpayment of property tax arising out of an admitted "misvalued" taxpayer residence in 1980, and after refunds for the years 1992, 1993 and 1994 had been issued, and erroneously apply the law of California as set forth in the Cal. Rev. and Tax. Code at 5096(a) (2) and Section 2635 thereof requiring the County to send a notice of overpayment to trigger the statute of limitations of one-year-after-notice?

Did the Court of Appeals err by refusing to exercise its equitable powers to require the Notice be sent while at the same time holding that the Bankruptcy Courts are courts of equity, thereby forcing the Appellant to seek a Writ of Mandate in the California State Courts to issue this mandatory Notice, or were the Notices already issued sufficient to trigger the one-year statute of limitation thereby making the claim asserted well within the required year valid?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
ARGUMENT	6
THE COURT'S REFUSAL TO DO EQUITY	9
CONCLUSION	12
APPENDIX	17

TABLE OF AUTHORITIES

Page

Franchise Tax Board v. MacFarland (in re MacFarland), 83 F.3d 1041, 1044 (9th Cir. 1996) _____3

United States v. Sampsell, 224 Fed 721, 722-23 (9th Cir. 1955) _____ 3

Bishop, McIntosh & McIntosh v. Molen, 116 Cal. App.3d 278, 282-283, 172 Cal. Rptr. 38 (1981) _____7, 8

Sunrise Retirement Villas et al vs. Placer County, filed by the Cal Appellant Court 27 Oct. 1997, 97 Daily Journal DAR 13341 and in full in Appendix p. 3 ___ 6 ,7, 10

Hewlett Packard Co. 50 Cal. App. 3d at 82 _____11

McNeil v. McNeil, 1909, 170 F. 289, 95 C.C.A. 485._____12

28 U.S.C. 157_____4

28 U.S.C. 5158_____4

California Revenue and Taxation Code 5097_____ 3, 6, 9

California Revenue and Taxation Code 4831_____ 3, 5, 6

California Revenue and Taxation Code 2635____ 3, 6, 7, 10

California Civil Code 3517 _____12

PETITION FOR A WRIT OF CERTIORARI

Frank and Helen McGee respectfully petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case denying Appellant right to equity in the U.S. Bankruptcy Court on a claim filed against bankrupt Orange County, CA at its request for admitted overpayment of taxes.

OPINIONS BELOW

The opinions of the Court of Appeals were labeled Not For Publication and are set forth in full in the Appendix.. There was no opinion of the lower U.S. Bankruptcy Court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). An Order of the Ninth Circuit Court issued 19 March, 1999 denied Appellant's petition for rehearing of an appeal filed by the Appellant in accordance with the U.S. Bankruptcy Rule 8002 on 12 June, 1997 from a final judgment barring Appellant claim entered on 2 June, 1997 by the United States Bankruptcy Court, Central District of California. The Appeal was referred pursuant to 28 U.S.C. 157 (a) to the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals established pursuant to 28 U.S.C. 5158 (b) (1) as amended by the Bankruptcy Reform Act of 1994 by an order of the Judicial Council dated May 1985, amended Oct. 15, 1992 and continued by Order, date 28 April, 1995 by the Bankruptcy Appellate Panels of the Ninth Circuit. This is an appeal from holding of the Ninth Circuit Bankruptcy

Appellate [illegible]l affirming the lower court in a 13-page opinion issued [illegible]ebruary 4, 1998 and from a two-page Memorandum issued 17 February, 1999 by the Ninth Circuit Court of Appeals affirming the Ninth Circuit Bankruptcy Appellant Panel opinion.

STATEMENT OF THE CASE

This is a petition for certiorari to the United States Supreme Court arising out of an appeal from the holding of the Ninth Circuit Court of Appeals and Bankruptcy Appellate Panel thereof upholding and affirming an Order by the Court barring a claim filed by Appellant against Orange County, CA, a political subdivision of the State of California, after Orange County filed for protection of the U.S. Bankruptcy Court under Chapter 9. The Order appealed from finds that: (1) "the County refunded taxes pursuant to the Claim 6596 filed by Mr. and Mrs. McGee for the years 1992, 1993, and 1994, and revised the assessment for the year 1995 pursuant to the Claim; and (2) the Claim for refunds for the years 1980 through 1991 is barred by the applicable statute of limitations." The claim is in amount of $21,125.81, and is for over-collection of taxes based on an admitted misvaluation by the County of Orange. The fact that at least double tax has been charged and collected by the County of Orange is undisputed. The County misvalued the McGee's residence beginning in 1980, although the McGee's have owned their residence since 1970. A Notice from the County, dated November 21, 1995 was sent to the Claimant and refund checks issued, the last payment received on August 2, 1996. The County of Orange, by letter subsequent, and after some refund checks were issued, requested Claimants to assert a claim for the remain-

der of the property tax refund in the U.S. Bankruptcy Court, Central District. At the request of the County, a claim for property tax refund was filed on February 23, 1996, claim No. 6596, three months and two days after the original Notice from the County, or well within the required one year after notice, as required to satisfy California Revenue and Taxation Code 5097 (a), and within the six-month requirement of California Revenue and Taxation Code 4831(a).

This claim has been subject to several objections by the County, starting in the summer of 1996, where it was the subject of a County motion dated 8 August, 1996 which stated that the claim was barred because it was untimely. This objection was withdrawn by the County after a conversation between Appellant's Counsel and the County's outside Counsel, in which it was stated that: "overpayment of taxes is undisputed by the County of Orange and will be paid in full." This statement was confirmed by letter sent to the Trustee and to County Counsel, Karen Carroll, dated August 18, 1996.

Next, the County filed an OMNIBUS OBJECTION, 22 (C) to the claim stating that the claim was not supported by the County's Books and Records. (This objection was ultimately sustained by the Bankruptcy Court, and is the subject of this appeal.) Claimant responded to this Objection 22(c) on January 2, 1997, stating that the claim it had filed constituted prima facie evidence of its validity and that the County had presented no evidence to rebut the validity. The Claimant stated further that the ultimate burden of proof is on the taxing authority, citing *"Franchise Tax Board v. MacFarland* (in re MacFarland), 83 F.3d 1041, 1044 (9th Cir. 1996) (citing In re Holm, 931, F.2d 620, 623 (9th Cir. 1991) and *United States v. Sampsell,* 224 F.2d 721, 722-23 (9th Cir 1955). This Objection was set for hearing on 5 March, 1997. A Reply of Orange County in support of OMNIBUS OBJECTION TWENTY-TWO (C) dated 1 March, 1997, included an Offer

of Proof which sought to foreclose the U.S. Bankruptcy Court from ordering a tax refund, stating that:

"3. The County has refunded a portion of Claim No. 6596 and has determined that the remainder of the Claim is subject to the applicable statute of limitations under the California Revenue and Taxation Code.

4. Under the Second Amended Plan of Adjustment for the County of Orange, effective June 12, 1996, property tax refund claims are classified Class B-24 and are not impaired under the Plan and each holder of a Class B-24 claim retains unaltered all legal, equitable, and contractual rights each might have under the California Revenue and Taxation Code.

5. Frank C. McGee and Helen H. McGee retain all rights of a Class B-24 for their Claim No. 6596.

6. The County declines to allow the Court to interfere with its political and governmental powers pursuant to the Revenue and Taxation Code."

The very next day at the hearing, the County, attempting to avoid a hearing on the merits, made the argument that the Court did not have jurisdiction. The Court heard arguments and concluded that it could hear and decide the matter, continuing the hearing until 16 April, 1997. On or about 21 March, 1997, the County served a Supplement to Omnibus Objection 21 (c), (a mistake, should be 22 (c)) containing a Declaration of Jim Persinger, Deputy County Counsel, dated 3-21-1997. This declaration under penalty of perjury states:

"I, Jim Persinger, declare:

1. I am a lawyer licensed to practice in California. I am employed as a Deputy County Counsel by the County of Orange. The County of Orange is represented by County Counsel, Laurence M. Watson, who has assigned this case to me. The facts set forth in this Declaration are

personally known to me and I can competently testify to those facts.

2. My review of the case shows the following: The County misvalued the taxpayer's residence in Newport Beach beginning in 1980. The County agrees the value was too high, double what it should have been back in 1980. When the taxpayer discovered the error in 1995, the Assessor went back four years and revised the assessment (back to 1992) and refunds were issued and received by the taxpayer for years 1992, 1993 and 1994. The roll for 1995 was revised prior to the tax due date."

* * *

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 21st day of March, 1997, at Santa Ana, California.

(Signed)

_____

Jim Persinger

This Supplement to OMNIBUS OBJECTION 22(C) was the County's first assertion of a statute of limitations as a defense and was dated 12 March, 1997, more than a year after the claim was filed. As a limitation defense the County asserted two statutes. The first was California Revenue and Taxation Code section 4831(a) setting forth the statute as it was substantially amended in 1995 and 1996 after the refund checks were issued. The second statute cited was California Revenue and Taxation Code section 5097 which states that the claim must be filed *"four years after making of payment sought to be refunded or within one year after the mailing of the notice, which ever is later." (Emphasis added.)* The BAP Opinion and the County of Orange state that a four-year

Statute of Limitations applies to refunds of property taxes, however, as can be seen, it is clear that the Statutes in question have a "one-year-from-notice" limitation, "which ever is later." The United States Bankruptcy Appellate Panel in its 13-page opinion affirming the lower court only dealt with the statute of limitations contained in Cal. Rev. and Tax. Code 5097. The other limitations section, 4831 (a), was the subject of a decision of the California Appellate Court concurrent with the hearing before the panel in November of 1997. The undisputed holding of this case was to strike down the statute of limitations in Cal. Rev. and Tax. Code 4831 (a) on facts similar to the case at hand. *Sunrise Retirement Villas et al v. Placer County*, filed October 27, 1997 (cite as 97 Daily Journal D.A.R 13341).

The Panel further held that the notice required under Cal Revenue and Tax Code 2635 was not sent and the notices sent by the County did not satisfy the requirements set forth in California Revenue & Tax Code 2635.

ARGUMENT

The Ninth Circuit Court of Appeals misapprehend and overlook the true status of this case in light of the California Court of Appeals ruling in *Sunrise Retirement Villas et al v. Placer County*, filed October 27, 1997 (cite as 97 Daily Journal D.A.R. 13341). This decision is an integral underpinning in the argument surrounding the County's failure to issue the required 2635 Notice of Overpayment. This statute reads as follows:

> "When the amount of taxes paid exceeds the amount due by more than ten dollars ($10), the tax collector shall send notice of the overpayment to the taxpayer. The

notice shall be mailed to the taxpayer's last known address and shall state the amount of overpayment and that a refund claim may be filed pursuant to Chapter 5 (commencing with Section 5096) of Part 9."

The Appellee stated that the 2635 Notice of Overpayment was not sent. The Court has now ruled that it was not sent. The Court stated that the *Bishop, McIntosh & McIntosh v. Molen* case, 116 Cal. App. 3d 278, requires that the 2635 notice be sent "only where the county tax collector's own records show an overpayment. 116 Cal App. 3d at 281-82." (See page 5, Court's Memorandum Opinion, App. 1.)

Based on the above-cited Sunrise Retirement case, the California Appellant Court has determined that the four-year Statute of Limitations does not apply in situations such as here, where a mistaken change of ownership triggered incorrect valuations over several years.

While Appellant's position is that a Notice triggering the one-year aspect of the Statute of Limitations was constructively issued or should have been issued and this Court under its broad powers of equity can so decide, the precedent now established by the Sunrise Retirement case definitely shows an actual overpayment and also the *potential for a claim* within the scope of 2635. Section 2635 imposes a duty on the Tax Collector to issue the Notice where his records show the potential for a claim, and not necessarily as the Court states in footnote 5 on page 5 of the Memorandum Opinion, where the records show an overpayment in fact. The full quote from the Molen case that seems to have been overlooked by the Court in this Opinion is stated on page 282 as follows:

"Since a tax collector does not exercise independent

judgment or discretion with respect to the legality or propriety of particular assessments, the Legislature could hardly have intended to vest that office with a broad discretion in evaluating prospective claims for the purpose of deciding whether to send a section 2635 notice. The fact that section 2635 imposes such a duty upon the tax collector only *where his records show* the potential for a claim within the scope of that section evidences a legislative intent to limit the tax collector duties in this regard.

Whether or to what extent the tax collector's "records" for this purpose may embrace matters beyond the tax rolls, it would strain the statute too far to hold that the tax collector should be compelled by writ of mandate to send a section 2635 notice on the basis of the allegations contained in appellant's letter. "[I]t is presumed that the assessing officers have properly performed the duties entrusted to them and, consequently, that their assessments are both regularly and correctly made." *(Utah Construction Co. v. Richardson* (1921) 187 Cal. 649, 654 [203 P. 401].) "Inasmuch as there is not a particle of evidence. . . . that an improper method of valuation was pursued" (id., at p. 655), we find no error in the denial of the writ. (See *People* ex rel. *Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491 [96 Cal.Rptr. 553, 487 P.2d 1193]; *Benny v. City of Alameda* (1980) Cal.Apd.3d 1006, 1012 [164 Cal.Rptr. 776].) *(Emphasis added).*

In light of the above, the duty to issue a 2635 Notice triggering the One-Year Statute of Limitations still exists. The Memorandum opinion has overlooked this aspect of the argument. It certainly would not be equitable to force the Appellants back into California State Court to file a writ of mandate to compel the County tax collector to issue a notice

of potential tax refund required by Rev. & Tax. Code 2635. As was stated in the above-cited Molen case, there is evidence in this case of improper valuation and the Notice must be issued in accordance with Rev. & Tax. Code 2635. The County's failure to discover the "potential for a claim" is analogous to footnote 5 of the Sunrise decision, at page 13344, which states as follows:

> "5. Although the phrase 'discovered' suggests a unilateral act of the Assessor subject only to his control, it would be unreasonable to construe the statute to permit him to circumvent his obligation to conform the tax roll to the facts by refusing to 'discover' them. Thus, the presentation to the assessor of evidence showing a mistake was made as to base-year value would be the equivalent of such a "discovery," at least sufficient to trigger a duty to correct the roll under section 51.5."

The Court should note that the Appellant was invited by the County to assert a claim for property tax refund in the United States Bankruptcy Court and that property tax refund checks were issued both prior to and after receipt of notice advising property tax refund recipients of the County of Orange's bankruptcy. Certainly it cannot be argued that the Appellant did not do all that was necessary and proper to perfect his claim within the time mentioned in Section 5097 (a) and (b) of the Cal. Rev. & Tax Code.

THE COURT'S REFUSAL TO DO EQUITY

The Court at page 7 of its opinion states that:

> "We do not wish to appear unsympathetic to Appellant's predicament by our holding. It is extremely

unfortunate that Appellants were overcharged on their taxes for such a long period of time. Because of this supposed injustice, Appellants would have us employ our equitable powers and order the County to refund the excess taxes paid from 1980 to 1991 notwithstanding the limitations statute. This, however, we should not do. We initially note that California law was applied to reach our result. Consequently, Appellants are treated no differently here than had they pursued their refund claim in state court. Although bankruptcy courts are courts of equity, Appellants should not receive special benefit merely because they are pursuing their refund claim in the bankruptcy forum." *(Emphasis added).*

Appellants are not asking that a statute of limitation be set aside, we are asking merely for the County to do what should have been done, i.e. issue a notice in accordance with Cal. Rev. and Tax. Code 2635 Notice of Overpayment. Instead the Courts refuse to do the equity under California law that Appellants are entitled to expect from all Courts, Federal or State and even Courts of Equity. The Court's refusal appears to be based on a greater good concept, trying to protect a bankrupt county, spending several pages on how important the statute of limitations is to the state while totally ignoring the latest decision of the California Appellate Court striking down a statute of limitations raised by the County in this very action, namely the aforementioned *Sunrise Retirement Villas et al vs. Placer County,* filed just one week before the hearing of this matter before the Panel.

While Appellants believe sufficient Notice was issued by the County in accordance with the Ca. Rev. and Tax. Code Section 2635, the County and now the Court say that the required notice was not issued as required by the same State

of California Legislature that "has the power to exact reasonable procedural regulations to facilitate the orderly collection of taxes." (*Hewlett-Packard Co.* 50 Cal. App. 3d at 82; page 8 of BAP opinion.) While the legal defense of a statute of limitation is a necessary defense in state affairs, it is not a defense in equity. The state property taxes are charged by the County and are, as here, hidden in impound accounts required by lending institutions for all but the very wealthy. It is clearly not equitable to leave the Appellant with an expensive procedure of going back to State Court to file for a Writ of Mandate to force a required notice to be issued and to have this very opinion raised as bar against the issuance of the writ. If this isn't a case for equity, then equity in the Bankruptcy Court is dead.

The Revised Assessment Notice itself on its face is a joint notice, both from the Auditor/Controller and the Tax Collector on Assessor stationary unsigned. This could have occurred because the Tax Collector was under indictment, or maybe this bizarre situation arose because the County of Orange filed for bankruptcy. In fact, this Notice requested questions on refunds be submitted to the Tax Collector and references the Tax Collector four times and the Assessor not at all, although it appears to be on Assessor's stationary. If this is not the notice required by law it certainly fulfills the requirements.

This case does deprive the Appellant of a fundamental right and no prejudice was caused by any delay occasioned thereby. A showing of prejudice has not been made nor mentioned in the BAP opinion concerning the importance of a statute of limitation. In a Court of Equity "only prejudicial delay will constitute laches" *McNeil v. McNeil,* 1909, 170 F. 289, 95 C.C.A. 485. Further, it is statutory law in the State of

California that "No one can take advantage of his own wrong" Cal. Civil Code 3517. Certainly a failure by the County of Orange to issue the required notice (or worse, to issue a trick notice) is wrong. He who seeks equity must do equity.

CONCLUSION

In light of the above, Appellant requests this Highest Court to return this case to the Ninth Circuit to do equity, or to order the Notice be issued.

Respectfully submitted,

James J. Foley,
Attorney for Appellant
AdmittedUnited States Supreme Court,
13 October, 1964

App. 1

United States Court of Appeals
FOR THE NINTH CIRCUIT

NO. 98-55661

In re: COUNTY OF ORANGE Debtor, FRANK MCGEE, HELEN MCGEE v. COUNTY OF ORANGE, a Political Subdivision of the State of California; HENNIGAN, MERCER & BENNETT, Appellees.	BAP NO. CC-97-01458-RuJo ORDER

Filed March 19, 1999

Before: CANBY, O'SCANNLAIN and WARDLAW, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing.
No further filing shall be accepted in this closed appeal.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: COUNTY OF ORANGE Debtor	No. 98-55661
FRANK MCGEE; HELEN MCGEE, Appellants, v. COUNTY OF ORANGE, a Political Subdivision of the State of California; HENNIGAN, MERCER & BENNETT, Appellees.	BAP No. CC-97-01458-RuJo MEMORANDUM[1]

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
David Russell, Robert C. Jones, Lawrence Ollason,
Judges, Presiding

Submitted February 9, 1999 (filed Feb 17, 1999)

Before: CANBY, O'SCANNLAIN AND WARDLAW,
Circuit Judges.

1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2. The panel unanimously finds this case suitable for decision without oral argument *See* Fed. R. App. P. 34(a).

Frank McGee and Helen McGee appeal the decision of the Bankruptcy Appellate Panel ("BAP") affirming a bankruptcy court order sustaining Chapter 9 bankruptcy debtor Orange County's objection to the McGees' claim for refund of overpaid property taxes for 1980 through 1991. We have jurisdiction under 28 U.S.C. § 158(d). We review decisions of the BAP de novo, and independently review the bankruptcy court's rulings. *See Dumas v. Mantle (In re Mantle)*, 153 F.3d 1082, 1084 (9th Cir. 1998). We review factual finding for clear error. *See Whitehead v Strauss (In re Whitehead)*, 583 F.2d 1104, 1107 (9th Cir. 1978). We affirm.

The BAP did not err in finding that the statute of limitations barred the McGees' claim. *See* Cal Rev. & Tax Code § 5097(a)(2). The BAP did not clearly err in finding that the County did not waive the statute of limitations. *See United States v Chichester*, 312 F.2d 275, 282-83 (9th Cir. 1963.). The BAP did not abuse its discretion in denying equitable relief. *See Sea World, Inc. v County of San Diego*, 33 Cal. Rptr. 2d 194, 205-06 (1994).[3]

AFFIRMED.

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3 We have considered the McGees' remaining contentions and find that they lack merit.

App 4

[Stamped: "NOT FOR PUBLICATION"]
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re COUNTY OF ORANGE, Debtor.	BAP No. CC-97-1458-RuJo BK. No. SA-94-22272-JR
FRANK McGEE andHELEN McGEE, Appellants, v. COUNTY OF ORANGE, Appellee.	MEMORANDUM[1]

Argued and Submitted on November 19, 1997
at Pasadena, California

Filed - February 4, 1998

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable John E. Ryan, Bankruptcy Judge, Presiding

Before: D. RUSSELL[2], JONES and OLLASON,
Bankruptcy Judges.

1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See BAP Rule 13 and Circuit Rule 36-3.

2. Honorable David E. Russell, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

Frank and Helen McGee ("Appellants") appeal an order of the bankruptcy court sustaining an objection by the appellee Orange County (the "County"), a Chapter 9 Debtor, to their proof of claim filed for a refund of overpaid property taxes. The County's objection was sustained on the basis that the applicable statute of limitations for requesting a refund for overpaid county taxes had passed and thus Appellants' claim was untimely. On appeal, Appellants argue that the statute of limitations had not run so as to preclude them from filing their proof of claim and that the County had, nevertheless, waived its statute of limitations defense. **WE AFFIRM.**

I. FACTS

The basic facts are not disputed. In December 1994, the County filed a petition under Chapter 9 of the Bankruptcy Code in the bankruptcy court for the Central District of California. In May 1996, the bankruptcy court confirmed the County's Chapter 9 Plan which became effective in June 1996. Under the Chapter 9 Plan, county property tax refund claims were not impaired. Claimants for property tax refunds retained all legal, equitable, and contractual rights they enjoyed under the California Revenue and Tax Code.

Appellants own residential real property in Orange County. from 1980 through 1995 they paid county property taxes. In 1995 it was discovered that the County had misvalued the roll value of Appellants' residential property on the County's property tax roll beginning in 1980. Due to this error, the County admits that Appellants have erroneously paid nearly double what they should have been charged in property taxes for the years 1980 through 1994. The County further admits that the excess taxes Appellants paid were caused by incorrect tax bills being sent by the County.

After the error in the roll value was discovered, the County refunded to Appellants the excess tax collected for years 1992, 1993, and 1994. The County also revised

Appellants' 1995 tax bill so that it would be based upon the correct roll value. Appellants then filed a proof of claim in the amount of $21,125.81 with the bankruptcy court for a refund of the remaining excess taxes paid. However, the County objected to the claim arguing that a refund for tax years 1980 to 1991 was barred by the applicable statute of limitations under the California Revenue and Taxation Code.

After a hearing, the bankruptcy court issued an order sustaining the County's objection on the grounds that "the Claim for refunds for years 1980 through 1991 is barred by the applicable statute of limitations." Appellants then filed this appeal.

II. ISSUES ON APPEAL

A. Whether the bankruptcy court erred in holding that the statute of limitations under California's Tax and Revenue Code barred Appellants from recovering the excess taxes they paid for years 1980 through 1991.

B. Whether the County waived its right to assert the statute of limitations defense.

III. STANDARD OF REVIEW

The applicability of a statute of limitations in a bankruptcy proceeding is a question of law reviewed de novo. See In re San Joaquin Roast Beef, 7 F.3d 1413, 1414 (9th Cir. 1993).

IV. DISCUSSION

As noted, under the County's Chapter 9 Plan, Appellants retained all legal, equitable, and contractual rights granted to them by the California Revenue and Tax Code with respect to their claim for a refund of the overpaid property taxes for years 1980 through 1991. Therefore, Appellants' right to a refund of the excess 1980 to 1991 taxes must be found within California's tax code.

A. The Statute of Limitations Defense

The refund provisions for overpaid taxes are found at Cal. Rev. & Tax Code App. §§ 5096 (a) and 5097 9a).[3] Cal. Rev. & Tax Code § 5096 (a) permits a California county to refund taxes that have been erroneously collected. The County readily admits that Appellants were erroneously overcharged on the 1980 to 1994 taxes. However, the County claims that under Cal. Rev. & Tax Code § 5097 (a) (2) it is required to only refund those taxes erroneously collected over the prior four years. Section 5097 (a) states:

> (a) No order for a refund under this article shall be made, except on a claim:
>
> > (1) Verified by the person who paid the tax, his or her guardian, executor, or administrator.
> >
> > (2) Filed within four years after making of the pay - ment sought to be refunded or within one year after the mailing of notice as prescribed in Section 2635, or the period agreed to as provided in Section 532.1, whichever is later.[4]

Cal. Rev. & Tax. Code § 5097 (a) (West Supp. 1997). The County focuses on the first part of §5097 (a) (2), which clearly states that a refund claim must be filed within four year after making the payment sought to be refunded, to conclude that no tax refund is owed Appellants for the years 1980 to 1991. The California courts recognize that § 5907 (a) established a four year limitations period for claiming a tax refund.

3. Sections 5096 and 5097 are found in Part 9, Chapter 5 of the California Revenue and Tax Code. Part 9 of the Code deals with Corrections, Cancellations, and Refunds. Chapter 5 deals with refunds of improperly collected taxes.

4. Appellants do not claim that section 532.1 is applicable on this appeal.

See Bishop, McIntosh & McIntosh v. Molmen, 116 Cal. App. 3d 278, 282 (1981; Pasadena Hotel Development Venture v. City of Pasadena, 119 Cal. App. 3d 412, 413-14 (1981); Hewlett-Packard Co. v. Santa Clara County, 50 Ca. App. 3d 74, 82 n. 3 (1975.

Appellants challenge the County's application of § 5097 to this case. They instead claim that the later half of § 5097 (a) (2), which required consideration of the language of Cal. Rev. & Tax Code § 2635, is the applicable portion of the statute in this case. The later portion of § 5097 (1) (2) permits a tax claimant to claim a refund within one year of receiving a § 2635 notice.[5] In relevant part, section 2635 provides:

> When the amount of taxes paid exceeds the amount due by more than ten dollars ($10), the tax collector shall send notice of the overpayment to the taxpayer. The notice shall be mailed to the taxpayer's last known address and shall state the amount of overpayment and that a refund claim may be filed pursuant to Chapter 5 (commencing with Section 5096) of Part 9.

Cal. Rev. & Tax. Code § 2635 (West 1987). Appellants argue that they received a § 2635 notice from the County and, because they subsequently filed their refund claim within one year, they are entitled to a refund for all overpaid taxes including years 1980 through 1991.

5. Appellants argue that Bishop, McIntosh & McIntosh v. Molman, 116 Cal. App.3d 278, supports their argument that filing a tax claim within one year of receiving a § 2635 notice permits them to recover the taxes for years 1980 to 1991. In Molmen, the court concluded that a § 2635 notice is required to be sent only where the county tax collector's own records show an overpayment. 116 Cal. App. 3d at 281-82. The court specifically held that a taxpayer's subjective belief that there may have been overpayment on his part was insufficient to require the tax collector to send a § 2635 notice absent actual evidence of overpayment. Id. at 282-83. Molmen does not expressly address the issues raised on appeal and thus is not helpful to the Appellants.

Appellants received two notices from the County. The first was entitled "Notice of Revised Assessment." Appellants argue that this Notice of Revised Assessment was issued pursuant to § 2635. There is no California case law detailing the elements of a § 2635 notice nor was a model § 2635 notice provided in the appellate record by the parties. However a plain reading of § 2635 required that such notice: (a) shall be mailed by the county tax collector; (2) shall state the amount the taxpayer has overpaid; and (3) shall inform the taxpayer that a refund claim may be filed pursuant to Chapter 5 (the refund provisions) of the California Revenue and Taxations Code.

A close examination of the Notice of Revised Assessment reveals that it does not contain the requirements of a § 2635 notice. The Notice was sent by the county assessor, not the county tax collector. The Notice merely informs Appellants that the County is initiating procedures to revise the assessment on their property after discovering the roll value error. It then details the correct property assessment value for 1995. The Notice also does not state the amount of any overpayments and does not indicate that a refund claim may be filed pursuant to the California Revenue and Tax Code. In fact, the Notice merely directs Appellants to contact the county Tax Collector if they have questions regarding a refund. Moreover, Appellants admit that they are uncertain whether the Notice of Assessment was even sent by the County's tax collector as required by § 2635. See Appellants' Reply Brief at 6-7 ("Who knows who sent this notice? It is unsigned.").

The second notice Appellants received was from the County's Office of Auditor-Controller. This notice merely informs all property tax refund recipients that their pre-bankruptcy refund claims may be filed in the form of a proof of claim with the bankruptcy court. It clearly does not contain the elements of a §2635 notice. Appellants admit as much

stating this notice is "an implied agreement under Section 2635." See Appellants' Reply Brief at 7. Appellants do not cite, nor have we found, any authority for the proposition that there may have been an implied §2635 notice. We therefore conclude that Appellants never received a notice pursuant to § 2635 from the County that might extend the limitations period past four years. The statute of limitations clearly limits Appellants' refund claim to the four prior years. They are therefore not entitled to a refund of overpaid taxes for 1980 to 1991.

We do not wish to appear unsympathetic to Appellants' predicament by our holding. It is extremely unfortunate that Appellants were over charged on their taxes for such a long period of time. Because of this supposed injustice, Appellants would have us employ our equitable powers and order the County to refund the excess taxes paid from 1980 to 1991 notwithstanding the limitations statute. This, however, we should not do. We initially note that California law was applied to reach our result. Consequently, Appellants are treated no differently here than had they pursued their refund claim in state court. Although bankruptcy courts are courts of equity, Appellant should not receive special benefit merely because they are pursuing their refund claim in the bankruptcy forum

Moreover, a limitations statute "is entitled to the same respect with other statutes, and out not to be explained away." Shepherd v. Thompson, 122 U.S. 231, 236 (1887) (quoting Clementson v. Williams, 12 U.S. 72, 74 (1814)). Simply "[t]o reject strict application of the law in favor of broad principles of justice and equity would make a statue of limitations meaningless." Aetna Cas. & Sur. Co. v. Superior Court (Lane), 233 Cal. App. 2d 333, 340 (1965), rev'd in part on other grounds, Tassel v. Superior Court, 12 Cal.3d 624, 627-28 (1974). According to the California Supreme Court, "[t]he only

restriction as to the legislative power with respect to a statute of limitations is that it must not be so manifestly inequitable as to amount to a denial of justice, and unless such is the case its determination is fina." Valley Circle Estates v. VTN Consol., Inc., 33 Cal. 3d 604 615, 659 P.2d 1160, 1167 (1983) (citations omitted). The California legislature "has the power to enact reasonable procedural regulations to facilitate the orderly collection of taxes." Hewlett-Packard Co., 50 Cal. App. 3d at 82. Here the people of California, acting through their legislature, have chosen to enact a four year limitations period for seeking a property tax refund as part of their procedure to collect taxes in an orderly fashion. We do not find this choice to be so manifestly inequitable as to amount to a denial of justice. We therefore must respect their decision.

We also recognize that section 5097 serves compelling public policy interests. A primary purpose of limitations statutes is to give defendants reasonable repose, that is, to protect parties from defending stale claims. Bernson v. Browning-Ferris Indus., 7 Cal.4th 926, 935, 873 P.2d 6i13, 618 (1994); Jolly v. Eli Lilly U Co., 44 Cal.3d 1103, 1112, 751 P. 2d 923 928 (1988). "Limitations statutes afford repose by giving security and stability to human affairs." Gutierrez v. Mofid, 39 Cal. 3d 892, 899, 705 P.2d 886, 890 (1985) (citations omitted). One basis for repose is the notion that at some point it becomes unreasonable to subject a person or an entity to the indefinite threat of suit. The passage of time entrenches a status quo, even if it is established through error, so that people come to order their affairs in accordance with settled expectations.[6] (following page) The law thus recognizes a point at which delay by a plaintiff in asserting a claim is so likely to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious. Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980). We must defer to the California legislature's determination of

when this point is reached with regards to refunding taxes. See Valley Circle Estates, 33 Cal.3d at 615, 659 P.2d at 1167 (statute of limitations determinations are final unless manifestly unjust).

In this case, the County needs the security of knowing that at some point its collected taxes cannot be challenged. If a limitations statute did not exist, or if such a statute was routinely disregarded by the courts, a county would be forever vulnerable to refund claims no matter now ancient the imposed levy. Errors committed decades ago could be alleged at any time so that a county would always be vulnerable to potentially heavy losses of revenue. In this case, Appellants' refund claim is $21,125.81 for a tax error made over the course of eleven years. An uncorrected error made on the tax rolls 20, 30 or 50 years ago could easily add up to an extraordinarily large refund claim with the potential to wipe out a county's coffers. Under certain limited circumstances, a tax claimant could also be entitled to interest on their refund. See Ca. Rev. & Tax Code § 5151 (West supp. 1997); former Cal Rev & Tax Code § 5150 (West 1987) (repealed 1994). The statute of limitations thus grants the County a degree of certainty when it arranges its financial affairs that ancient and potentially large tax claims will not drain the county budget. See Kaiser Found. Hosp. v. Workers' Compensation Appeals Bd., 39 Cal.3d 57,62,702 P.2d 197, 200 (1985) (certainty, finality in the administration

6. (*see preceding page*) There are limits to this principle. For example, when a wrong is so great or is inflicted maliciously, a new state of affairs may never be accepted as the status quo by those who are disadvantaged by it. Cf. Cal. Penal Code § 799 (West Supp 1997) (stating that criminal prosecution for murder may be commenced at any time). This however is not the circumstance in this case. The right to a tax refund is purely statutory and we must look to the terms of the governing statute to determine whether a tax claimant properly filed his refund claim. Osco Drug, Inc. v. County of Orange, 221 Cal. App. 3d 189, 195 (1990). A statute of limitations barring a tax refund claim is thus not analogous to the deprivation of a fundamental right or liberty.

of affairs, and the predictability in legal affairs promoted by statutes of limitation).

The benefits of fiscal certainty are clear. A county enacts a budget, usually made up of tax revenue, so that it can fund public programs. If its tax collections were forever subject to challenge, a county could never be certain of its reservoir of revenue. Budgetary planning would become difficult, if not impossible. Such uncertainty would surely effect budgetary priorities and possible public programs. A limitations line must be drawn otherwise the County would be forever susceptible to the financial turmoil caused by ancient and unpredictable tax refund claims. The California legislature chose to draw that line at four years. We find no equitable or public policy reasons for ignoring the clear limitation statute and subjecting a county or its taxpayers - who would ultimately pay any refund - to that level of uncertainty.

Another important function of limitations statutes is to encourage plaintiffs to diligently assert their rights. Bernson, 7 Cal.4th at 935, 873 P.2d at 617; Jolly, 44 Cal.3d 1103. In this case, we cannot say that Appellants acted with utmost diligence in protecting their rights. Appellants were not without recourse over the eleven years they overpaid property taxes. They could have easily verified whether their property's roll value was correct each year the assessment was made. See Cal. Rev. & Tax Code § 1602 (West 1987). They also could have challenged an assessment each year it was made. See Cal. Rev. & Tax Code § 1602 (West 1987). They also could have challenged an assessment each year it was made. See Cal. Rev. & Tax Code § 1603 et seq. (West Supp. 1997) (procedures for filing application for reduction of roll value assessment); Cal. Rev. & Tax Code § 5140 et seq. (1997) (procedures for filing refund actions by taxpayers) We recognize there is nothing in the record indicating Appellants were aware that an error had been made. However, with

property ownership comes responsibilities. Among these must be the requirement for property owners to diligently investigate that they are being assessed the correct tax. The courts cannot remedy every instance of neglect or inattentiveness to these responsibilities. Unfortunately, Appellants' inattentiveness to the correct roll value of their property has caused them to pay a heavy price. They have learned the hard lesson that all property owners should, on occasion, examine their property tax roll value to make sure it is correct.

Lastly, we note that California's tax code works both ways. If Appellants had been under-assessed on their property taxes, they could have asserted a limitations statute to preclude the County from collecting back taxes past four years. Hewlett-Packard Co., 50 Cal. App. ed at 82 n. 3. Under such circumstances, Appellants would have benefitted from a roll value error. Thus it cannot be said that all taxpayers are prejudiced by a four years limitations statute.

Since section 5097 prohibits Appellants from recovering the taxes overpaid for years 1980 to 1991, we need not reach the County's alternative argument that Cal. Rev. & Tax. Code § 4831 also creates a de facts four years limitations period.

B. Appellant's Waiver or Reaffirmation Claim

Appellants also claim that the County waived its statute of limitations defense or reaffirmed its obligation by previously agreeing to refund all the overpaid taxes. Specifically, Appellants allege that prior to filing its present objection, the County, through an individual named Karen K. Carroll, agreed to refund the overpaid 1980 to 1991 taxes in full. As the only proof of this waiver or reaffirmation, Appellants offer a letter their counsel wrote in which he confirms a conversation during which Ms. Carroll supposedly agreed to refund all tax overpayments.

Even if such a promise was given, there is no evidence that Ms. Carroll had the authority to waive the County's lim-

itations defense. The letter does not identify who Ms. Carroll is, let alone indicate on what authority she could waive the limitations defense. The letter does not indicate whether Ms. Carroll is a county official and it is not even addressed to the County, but rather to a private law firm. Furthermore, Appellants' counsel states in the letter that if the County does not agree to refund all overpaid taxes, "a hearing is hereby requested." This suggests that no definitive promise for a full refund was made. Most importantly, the County expressly declined to waive its rights under the statute of limitations before the bankruptcy court. Appellants' waiver/reaffirmation argument is thus without merit.

CONCLUSION

Because the statute of limitations precludes Appellants from receiving a tax refund for years 1980 to 1991 and the County did not waive its limitations defense, **WE AFFIRM**

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Santa Ana, California 92702-1379

Telephone (7ar) 834-6257
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re COUNTY OF ORANGE, a Political Subdivision of the State of California Debtor	CASE NO. SA 94-22272-JR Chapter 9 ORDER GRANTING MOTION BY THE COUNTY OF ORANGE OBJECTING TO PROOF OF CLAIM NO. 6596 IN OMNIBUS OBJECTION TWENTY-TWO(C) DATE: May 29, 1997 TIME: 9:30 p.m. PLACE Courtroom 606 42 Civic Center Plaza Santa Ama. CA 02701

AT SANTA ANA, CALIFORNIA, IN THIS DISTRICT, ON THIS ____ DAY OF ____, 1997

On May 29, 1997, at 9:30 a.m., a hearing was held on the "Omnibus Objection Twenty-Two(c)" to Creditor Claim No. 6596 filed by frank and Helen McGee in the above-captioned proceeding. James J. Foley appeared for Frank and Helen McGee, and Jim Persinger, Deputy County Counsel, appeared for the County of Orange, Debtor

This Court having considered the Motion, the pleadings, and documents filed in support of and in opposition to the Motion, the files and records in this case and the arguments presented at the hearing on the Motion, finds that: (1) the County refunded property taxes pursuant to the Claim No. 6596 filed by Mr. and Mrs. McGee for the years 1992, 1993, and 1994, and revised the assessment for the year 1995 pursuant to the claim; and (2) the Claim for refunds for the years 1980 through 1991 is barred by the applicable statute of limitations.

NOW, THEREFORE, for the foregoing reasons and for other good cause, it is hereby ORDERED that the Motion by the County of Orange Objecting to Proof of Claim No. 6596 in Omnibus Objection Twenty-Two(c) is granted.

Honorable John E. Ryan,
United States Bankruptcy Judge

Presented By:

s/_____
Jim Persinger, Deputy
Attorney for County of Orange.

THE COUNTY COUNSEL
COUNTY OF ORANGE

October 30, 1997

Nancy B. Dickerson, Clerk
United States Bankruptcy Appellate
Panel of the Ninth Circuit

Re: *In re County of Orange, Debtor*
Appellant Frank McGee
BAP No. CC-97-1458
BK No. SA 94-22272 JR

Dear Ms. Dickerson:

Pursuant to Fed. R. App. P. 28(j), this is to advise the panel of an additional California Appellate Court decision relevant to the issues presented in the above-referenced case. Five copies are enclosed. Thank you for your courtesy.

Very truly yours,

LAURENCE M. WATSON
COUNTY COUNSEL

By "s/_____"
Jim Persinger, Deputy

TAXATION

Error in Change of Ownership Determination Is Correctable At Any Time, Not Subject to Statute of Limitations

CITE AS 97 DAILY JOURNAL D.A.R. 13341

SUNRISE RETIREMENT VILLA et al.,
Plaintiffs and Respondents,
v.
PLACER COUNTY ASSESSOR,
Defendant and Appellant.

No. CO24496
(Super. Ct. No. SCV-4408)
California Court of Appeal
Third Appellate District
(Placer)
Filed October 27, 1997

APPEAL from a judgment of the Superior Court of the County of Placer, James L. Roeder, Judge. Reversed and remanded.

Anthony J. LaBouff, County Counsel, and Gerald O Carden, Chief Deputy County Counsel, for Defendant and Appellant.

BLACKMAN & BLACKMAN AND DAVID M. BLACKMAN, FOR PLAINTIFFS AND RESPONDENTS.

Revenue and Taxation Code section 51.5 (all further unspecified statutory references are to this code) requires a county tax assessor to correct errors in the tax roll which are not based on judgment as to value in the same assessment year they are "discovered." This case calls on us to plumb the murky water of available remedies when the county assessor refuses the taxpayer's request to correct such an error eight years after it was allegedly made and the normal time for appeal has expired.

In 1986 the Placer County Assessor (Assessor) determined there had been a change in ownership on property owned by plaintiffs to trigger a new "base year' for purposes of property valuation under article XIII A of the California Constitution. The determination triggered a supplemental assessment and was reflected in valuations for succeeding years.

In 1994 plaintiffs discovered facts which they claimed showed the Assessor had erred in determining that ownership had changed. After failing to persuade the Assessor, plaintiffs filed an appeal with the Placer County Assessment Appeals Board (AAB) to change the assessment. The AAB ruled it had no jurisdiction because the application was filed more than four years after the Assessor redetermined the base-year value (§ 80, subd. (a)(3)).

Plaintiffs thereafter filed this petition for writ of mandate in superior court, asking that the court either (1) direct the Assessor to correct its 1986 base-year value to reflect no change in ownership, or (2) compel the AAB to set aside its order denying the application for lack of jurisdiction and set the matter for a hearing on the merits.

The trial court granted the first prayer for relief. On this appeal, we will conclude it should have granted the second.

BACKGROUND

The properties which are the focus of this appeal are two separately assessed parcels known in rolls of the Assessor as Parcel No. 470-010-045 (Parcel 045) and Parcel No. 470-010000-001 (Parcel 001). Prior to 1986, record title to Parcel 001 stood in the name of Edward and Nancy Latin (Latin), David Lonon (Lonon), and Michael Klein (Klein). Parcel 045, on the other hand, stood in the name of Latin only under a 1977 grant deed.

In September 1986 Klein, Latin, and Lonon formed a partnership known as Sunrise Retirement Villa (SRV) whose purpose was to construct and operated a retirement facility on the parcels.

In 1986 the three partners deeded Parcel 001 to SRV and Latin deeded Parcel 045 to SRV.[1] On the basis of the documentation available, the Assessor determined there had been a change in ownership for both parcels in 1986 and reassessed the property. (§ 60 et seq.) Supplemental assessments were levied and revised assessment notices were sent.

Lonon died in 1990. During a probate of his estate, one of the surviving partners of SRV reviewed the large tax bill owed by the partners to Placer County and discovered the 1986 change in ownership reassessment. SRV promptly reported to the Assessor's office that a mistake had been made with respect to both parcels, maintaining the deeds conveying title to SRV merely changed the form of ownership from the individual partners to the partnership.

The 1986 deed for Parcel 001 showed a transfer from Lonon, Klein, and Latin to SRV, but the deed for Parcel 045

1. The chain of transactions is actually much more complicated than described here, involving a split of Parcel 045 and recombination with other parcels of land, and a mistaken deed recorded in 1980. For clarity, we present a simplified version of the facts essential to the disposition of the appeal.

showed a conveyance only from Latin to SRV. On this basis, the Assessor concluded that an error had been made in its change of ownership determination for Parcel 001 (§ 62, subd. (a)(1)), but there was insufficient evidence that Klein and Lonon co-owned Parcel 045 equally with Latin such that in fact no change of ownership occurred with respect to the 1986 deed for that parcel. The Assessor made the correction to the assessment roll and issued a refund on Parcel 001, but refused to change the roll for Parcel 045.

There ensued a period of correspondence and meetings between SRV and the Assessor during which SRV provided documentation in support of its claim that the subject property had been co-owned by the individual partners in SRV since the middle of 1982 notwithstanding that record title stood solely in the name of Latin at the time of the 1986 deed. One of the documents was a superior court judgment obtained by stipulation on a complaint by SRV to quiet title. The judgment was obtained in response to county counsel's statement to SRV's attorney that "[c]ourt judgments or decrees concerning this property" would provide "crucial" support to the claim of continuous co-ownership. The judgment obligingly recited that "ownership of the subject property remained in the Latins, Lonons, and Kleins from the middle of 1982 until the property was transferred on October 20, 1986 to [SRV]."

The judgment failed to persuade the Assessor to change his position that there was insufficient evidence that Klein and Lonon held partnership interests in the property prior to 1986. SRV than appealed his decision to AAB by filing an application for a changed assessment.

The application came before the AAB for an administrative hearing. At the hearing, a motion was made, prior to the introduction of evidence, to refuse to hear the appeal on jurisdictional grounds, because SRV's application was made beyond the four-year limitation period for challenging base-

year value reassessments established in section 80, subdivision (a)(3) (section 80(a) (3)). The motion carried and the appeal was "denied" for lack of jurisdiction.

Plaintiffs SRV and its surviving partners then commenced this action for writ of mandate in superior court against both the Assessor and the AAB. The essential thrust of the petition is: (1) under section 51.5, errors in the assessment roll which are not based on judgment as to value (hereafter nonjudgmental errors) may be corrected any time during the year in which they are discovered; (2) SRV had conclusively shown the Assessor committed such an error in refusing to correct the roll upon proof that no change of ownership occurred; (3) the Assessor abused his discretion in refusing to carry out his "mandatory duty" to correct the error; and (4) the AAB abused its discretion in refusing to hear the appeal on statue of limitations grounds.

Plaintiffs prayed for either a peremptory writ commanding the Assessor to correct the 1986 base-year value determination and change the rolls accordingly, or directing the AAB to set aside its previous order and hear the appeal.

After overruling the Assessor's demurrer, receiving voluminous evidence, and holding a hearing, the court issued a peremptory writ ordering the Assessor to make the correction. In its written ruling, the court placed crucial reliance on the judgment decreeing that the SRV partners had continuously owned the property since 1982. In the words of the court: "[The] judgment in rem was binding on all the world, and the Assessor was not entitled to disregard it."

App 24

APPEAL

I

The Parties' Positions

The Assessor argues: (1) issuance of the writ was improper because plaintiffs' remedy was to commence a refund action and the writ violates the statutory prohibition on injunctive relief preventing or impeding the collection of property taxes; (2) section 51.5 does not override the four-year limitation on hearing change of ownership disputes, and thus the AAB was correct in dismissing the appeal; and (3) the trial court erred by substituting its discretion for the Assessor's and deciding the ultimate issue by way of motion without an administrative record or an evidentiary hearing.

Plaintiffs respond that (1) section 51.5 authorizes correction of nonjudgmental errors in the tax year it was discovered, regardless of how long ago the error was made, (2) SRV had a right to hearing before the AAB and the trial court's determination that no adequate remedy existed should not be overturned, (3) the order does not violate the prohibition on injunctive relief since it does not bar payment or collection of any taxes, and (4) the court properly decided as a "question of law" the issue of whether the property had changed ownership based on the conclusive evidence presented to it.

Before addressing these contentions, we must remember the procedural context in which this case comes to us: the Assessor and the taxpayer became embroiled in a dispute over whether the 1986 roll should be changed based on the "discovery" of an alleged nonjudgmental error (i.e. change of ownership determination), the taxpayer appealed to the AAB and the AAB punted the issue by tossing out the appeal for lack of jurisdiction.

The present action was styled as one for administrative mandamus under Code of Civil Procedure section 1094.5. However, administrative mandate under this section will lie

only to challenge the validity of a *final administrative adjudication* vested in an inferior administrative tribunal as the result of a proceeding when (1) a hearing is required, (2) evidence is required to be taken, and (3) discretion in the *determination of the facts* is vested in an administrative agency. (Code Civ. Proc., § 1094.5, subd. (a); Cal. Civil Writ Practice (Cont.Ed.Bar 1997) § 6.1,p. 189 (Cal. Civil Writs).)

If the administrative agency is empowered to decide the factual issue in the first instance and it erroneously fails or refuses to do so, either administrative or traditional mandate is available to compel the agency to hold a hearing. (See Ca. Civil Writs, *supra,* § 6.5, p. 197; *County of Sacramento v. Assessment Appeals Bd. No 2* (1973) 32 Cal.App.3d 654, 673 *of Sacramento).)* In such cases the proper remedy is to order the agency to perform its statutorily mandated duty - but the court may not step into the shoes of the agency and perform its function for it, since mandate does not lie to control the discretion conferred in a public agency. *(People ex re. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.)

Once the administrative process has been exhausted, there are avenues for judicial review. However, the court cannot leapfrog this process by holding its own mini-trial before the administrative agency has exercised its jurisdiction in the first instance: "These agencies have been vested with quasi-judicial authority to hold hearings, take evidence, and render a decision based upon findings of fact. [Citation.] The right to a limited review of that decision by a reviewing court has also been provided. (Code Civ. Proc., § 1094.5.)[2] To allow the

2. We note that the mechanism for judicial review of decisions by a county assessment appeals board is significantly different from that of other administrative agency decisions. Ordinarily the aggrieved taxpayer's remedy is not to seek administrative mandate pursuant to Code of Civil Procedure section 1094.5, but to pay the tax and file suit in superior court for a refund *(County of Sacramento, supra,* 32 Cal.A;;.3d at p. 672; Cal Administrative Mandamus (Cont.Ed.Bar. 1989) § 3.16, p. 86.)

parties to challenge every administrative decision with another trial de novo would be a waste of both administrative and judicial resources, and the administrative hearings would be nothing more than perfunctory gestures" *"(Eureka Teachers Assn v. Board of Education* (1988) 199 Cal.App.3d 353, 366, fn. added.)

It therefore follows that if the AAB erred in refusing to exercise its own jurisdiction, the trial court could have and should have issued the writ to compel it to so act. *(County of Sacramento, supra,* 32 Cal.App.3d 654 [assessment appeals board erroneously ruled it had no jurisdiction]; *Main & Von Karman Associates v. County of Orange* (1994) 23 Cal.App.4th 337, 343-344 [assessment appeals board used wrong methodology and refused to admit competent evidence; mandate issued to conduct further proceedings]; *California Correction Peace Officers Assn.* v.*State Personnel Bd.* 1995) 10 Cal.4th 1133, 1150 [administrative agency failed to adjudicate grievance within the statutory time limit].)

II

Section 51.5 and the Statute of Limitations

We now turn to the substantive question of whether the AAB correctly dismissed the appeal due to expiration of the statute of limitations set forth in section 80(a)(3). Preliminarily, we overview the pertinent law as concisely summarized in *Osco Drug, Inc, v. County of Orange* 1990) 221 Cal.App.3d 189:

"Article XIII A of the California Constitution revised the real property taxation system by limiting taxes to 1 percent of a property's base-year value compounded by an inflation factor. Base-year values are reestablished only if property is purchased, is newly constructed, or if there is a change in ownership. [P) Property owners have four years within which to

appeal new base-year value determinations by filing an application for reduction with the county assessment appeals board. (§§ 80, subd. (a)(3), 1603.) Should the application result in a reduction in the base-year value, the taxpayer may seek a refund of taxes paid. (§§ 5097, 5097.2) [P] There is a distinction between the reduction in a base-year value and a right to a refund of taxes. The base-year value is a control figure from which an assessment is determined. The correction of the base-year value allows the assessor to determine whether there has been an overassessment or an underassessment. Thereafter, an application must be made for a refund." (221 Ca.App.3d at pp. 192-193, fn. omitted.)

Prior to section 51.5, if the assessor found that a property had been underassessed, he could correct the tax roll and make adjustments in the form of additional taxes, called "escape assessments." However, escape assessments could only be issued for a limited time, usually four years, from the original assessment. *(Montgomery Ward & Co. v. County of Santa Clara* (1996 47 Cal.App.4th 1122, 1129; § 532.)

In the case of *Dreyer's Grand Ice Cream, Inc. v. County of Alameda* (1986) 178 Cal.App.3d 1174, 1180-1182 (*Dreyer*'s) the Court of Appeal ruled that the base-year value for any given property could not be changed after expiration of the four-year-statute of limitations provided by the statute governing escape assessments. The Legislature took action to overrule *Dreyer's* by enacting section 51.1 (Stats. 1987, ch. 5137, § 2.)

Subdivision (a) of section 51.5 (§ 51.5.(a)), which is at the heart of this appeal, provides: "Notwithstanding any other provision of the law, any error or omission in determination of a base year value...which does not involve the exercise of an assessor's judgment as to value, shall be corrected in any assessment year in which the error or omission is discovered." If the correction reduces the base-year value, appro-

priate refunds may be granted; if the correction increases the base-year value, escape assessments may be levied. (§51.5, subd. (d).)[3]

In the preamble to the legislation, the Legislature "finds and declares that fairness and equity require that county assessors have express authority to make corrections to property tax base-year values whenever it is discovered that a base-year value does not reflect applicable constitutional or statutory valuation standards or the base year value was omitted. Any limitations imposed upon the assessor's authority to correct these errors would result in a system of taxation which, on the one hand denies the benefits of Article XIII A of the California Constitution to some taxpayers where the barred error or correction would reduce the base-year value and, on the other hand, encourages even the most honest person to engage in deception and concealment in order to delay discovery of changes in ownership or new construction beyond the point where a correction of the base-year value can be made." (Stats. 1987, ch. 537, § 1 subd. (a), italics added; West's Annot. Rev. & Tax. Code (997 pocket pt.) Historical and Statutory Notes, § 51.5, p.6.)

There is no dispute that an erroneous "change in ownership" determination constitutes an error not based on value judgment within the meaning of section 51.5(a). Unquestionably, that section gives the assessor the *authority*, should he choose to exercise it, to reverse an inaccurate change of ownership determination whenever it is "discovered," and to revise all base-year values accordingly, as the Assessor in fact did in the case of Parcel 001.

What happens, however, when the assessor refuses to

3. Section 51.5 also has provisions for correcting value judgment errors in base-year values (subds. (b) and (c)), but sets a four-year backward limit on such corrections in most cases. (See *Sea World, Inc. v. County of San Diego* (1994) 27 Cal. App 4th 1390, (*Sea World*). These provisions are not at issue on this appeal.

make a section 51.5(a) correction even after the taxpayer produces evidence purporting to show such an error was committed, as occurred in this case? Lacking the force of persuasion, does the taxpayer have a remedy? In order to answer that question we need to look at the statutory procedure for appealing base-year value determinations.

Local boards of equalization (either a county assessment appeals board or the board of supervisors) are established by the California Constitution to hear appeals from decision of the tax assessor. (Cal. Const., art. XIII, § 15; see 2 Ehrman & Flavin, Taxing California Property (3d ed. 1997) § 26:01, pp. 1-2 (Ehrman).)

The appeals process is commenced by filing a written application for changed assessment with the local board. (§ 1603.) The board then sets the matter for hearing at which it receives evidence. (§ 1604.) This appeals process is essential to filing a subsequent claim for a refund in superior court, and skipping this step will usually result in the dismissal of the suit for failure to exhaust an available administrative remedy. (Ehrman, *supra,* § 30:01, pp 1-2; see *C.H.B. Foods, Inc. v County of Los Angeles* (1987 195 Cal.App.3d 821 [appeal to board necessary even where contested issue is one of law].)

The code also contemplates that disputes between the assessor and the taxpayer regarding ownership change reassessments be resolved by the local appeals board before resort is made to the courts. Section 1605.5, subdivision (a)(1) states: "The county board shall hear applications for a reduction in an assessment in cases in which the issue is whether or not the property has been subject to a change in ownership...." Subdivision (a)(3) ensures that such adjudication does not affect the taxpayer's later right to a trial in superior court. The AAB thus has been given jurisdiction expressly to adjudicate change of ownership disputes. Here, the AAB did not adjudicate the change of ownership dispute

because it ruled the application was barred by section 80(a)(3).

While it is true that this section, on its face, imposes a four-year time limit on appealing base-year reassessments,[4] we must consider the impact of section 51.5 on the entire statutory scheme. The statutes must be read together to achieve a result that is reasonable and practical and comports with the apparent intention of the Legislature. (*In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1216.)

The categorical language of section 51.5(a) evinces a clear intent to remove any and all time restrictions on correcting nonjudgmental errors in determining base-year values: *"Notwithstanding any other provision of the law, nonjudgmental errors* "shall be corrected in any assessment year in which the error or omission is discovered." (Italics added.)

Since the purpose of the law was to *remove* any time limits on correction the roll based on nonjudgmental errors, reading a statute of limitation back into the law would run contrary to the express wording of the statute.

Furthermore, the legislative history of the law strongly supports the view that lifting time restrictions on correcting nonjudgmental mistakes was meant to be a two-way street, benefiting taxpayers and assessors equally.

The Senate Revenue and Taxation Committee report on Senate Bill No. 587 states "Since it is possible for assessment errors to go either way, both in favor of and against the taxpayer, the Dreyer's case can result in higher taxes on a prop-

4. Section 80(a)(3) states: "The base-year value determined pursuant to [section 110], subd. (a) (2)] shall be conclusively presumed to be the base-year value, unless an application for equalization is filed during the regular equalization for the year in which the assessment is placed on the assessment roll or in any of the three succeeding years. Once an application is filed, the base-year value determined pursuant to that application shall be conclusively presumed to be the base-year value for that assessment."

erty due to a now-uncorrectable assessment error. *If, for example, a property is appraised too high based on incorrect information, and neither the taxpayer nor the assessor realize the error for more than four years, existing law...would prevent the tax from being reduced now or in any future year until the property changes ownership.*" Comments, Sen. Revenue & Taxation Com. Digest (Apr. 22, 1987) Sen. Bill No. 587, p.2, italics added.) The assembly report emphasizes that the correction "must be made in the year the error or omission was discovered, *regardless of when the valuation was originally made.*" (Bill Report on Sen. Bill No. 1587, Assem. Com. on Revenue & Taxation (June 22, 1987) italics added.) The report also boasts of the new law's ameliorative effect on property owners: "Bill Protects Taxpayers From Overassessments. [P] It is possible for assessment errors to occur which either underassesses or overassesses properties. If a property is inadvertently valued too high, and the overvaluation is not discovered within four years, under current law the tax could not be reduced until the property changes ownership. *This bill is intended to protect taxpayers from this kind of inflexibility,...*" (*Id.* at p. 3, italics added.)

If section 80(a)(3) were read to bar a taxpayer from obtaining relief from nonjudgmental errors more than four years after the incorrect base-year value were established, as implied by the AAB's ruling, the result would be to grant the Assessor an *unlimited* time in which to make an upward adjustment in the base-year value due to a nonjudgmental mistake, but close the door on the taxpayer seeking a parallel downward adjustment after four years. Such a construction frustrates the intent of section 51.5 as expressed in both the language and history of the statute.

The AAB's construction also apparently overlooks the fact that when section 51.5 was enacted, section 80 also was

revised. (Stats. 1987, ch. 537, § 3.) Subdivision (a)(4) was added, providing that any base-year value *"determined pursuant to Section 51.5"* becomes conclusive unless timely challenged. Italics added.) If challenged, the outcome of the appeal conclusively establishes the base-year value for that year. Thus, the Legislature contemplated that the taxpayer be able to resort to the equalization process when confronted with an upward adjustment in value due to a nonjudgmental error. Logic and fairness dictate the same procedure should be available when the Assessor refuses to make a downward correction, especially in light of the clear ministerial duty imposed on him by statute to correct the tax roll in the same year any such mistake is discovered.[5]

We finally observe that section 51.5 provides an independent mechanism for correcting base-year values apart from the normal appeals procedure. *(Sea World, supra,* 17 Cal.App.4th at p. 1399.) This substantive change in the law, together with the unqualified language of section 51.5(a) supersedes any statutory time restriction on the taxpayer's right to a correction in the tax roll which otherwise might apply.

We conclude that section 51.5(a) errors are correctable at any time *Montgomery Ward & Co. v. County of Santa Clara, supra,* 47 Cal.App.4th at p. 11133) and are not subject to the time limitations on changing base-year values imposed by prior statutes. Therefore, when the Assessor refused to make the correction, plaintiffs had the right to have that decision reviewed by the AAB and were not precluded by section 80(a)(3).

5. Although the phrase "discovered" suggests a unilateral act of the Assessor subject only to his control, it would be unreasonable to construe the statute to permit him to circumvent his obligation to conform the tax roll to the facts by refusing to "discover" them. Thus, the presentation to the Assessor of evidence showing a mistake was made as to base-year value would be the equivalent of such a "discovery," at least sufficient to trigger a duty to correct the roll under section 51.5.

The AAB erred when it determined it had no jurisdiction over the subject matter due to the fact that more than four years had elapsed since the Assessor changed the base-year value. Remand to the AAB was one of the alternative prayers for relief sought by plaintiffs and is appropriate to the facts of this case. (See discussion *ante*, pp. 8-9.) The cause must be remanded to the AAB to exercise its jurisdiction in the first instance. (*Midstate Theatres Inc. v. Board of Supervisors* (1975) 46 Cal.App.3d 204, 213.)

III

Disposition of Assessor's Remaining Claims

The disposition we order moots all of the other principal objection raised by the Assessor to the judgment below.

For example, the Assessor asserts that by issuing the writ in the first instance the court improperly shortcut the refund procedure, and that plaintiff's proper remedy was a suit for a refund. As demonstrated, remand to the AAB to hear plaintiffs' appeal neither aids nor impedes their right to seek a refund of taxes improperly collected. Correction of the base-year value figure does not automatically entitle the taxpayer to a refund.(*Osco Drug, Inc. v. County of Orange, supra*, 221 Cal.App.3d at p. 193.) Refunds are governed by separate provisions of the code, and the taxpayer may only recover a refund by complying with those statutes. (*Sea World, supra*, 27 Cal.App.4th at pp. 1400-1401.) As section 51.5, subdivision (d) states, if the correction reduces the base-year value, "appropriate cancellations or refunds of tax shall be granted *in accordance with this division.*'"(Italics added.)

Remand to the AAB also dispenses with the Assessor's argument that the writ impermissibly enjoins or prevents the collection of property taxes. (§ 4807, Cal. Const., art. XIII, § 32.) The writ, as we will modify it, will do nothing except

order the AAB to perform its duty to hear the appeal on its merits. The Assessor is not restrained from collecting taxes.

Finally, reinvesting the AAB with jurisdiction obviates the claim that, by directly ordering the Assessor to perform the correction, the trial court improperly substituted its discretion for that of the agency and decided a factual controversy without the benefit of an administrative record. The change of ownership issue will now be litigated before the AAB and presumably a complete administrative record will be developed, permitting further review if necessary.

DISPOSITION

The judgment is reversed and the cause is remanded. The trial court shall enter a new judgment issuing a peremptory writ of mandate which shall direct the Placer County Assessment Appeals Board to vacate its decision denying plaintiffs' appeal on jurisdictional grounds and instead to hear the appeal on its merits. The parties shall bear their own costs on appeal.

CALLAHAN, J

We concur:

RAYE, Acting P.J.

SPARKS, J*

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution